

## SENATE BILL NO. 398

INTRODUCED BY R. ZINKE

A BILL FOR AN ACT ENTITLED: "AN ACT ELIMINATING CERTAIN TIPS AND GRATUITIES FROM THE DEFINITION OF "WAGES" UNDER UNEMPLOYMENT INSURANCE LAW AND WORKERS' COMPENSATION LAW; AMENDING SECTIONS 39-51-201 AND 39-71-123, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-51-201, MCA, is amended to read:

**"39-51-201. General definitions.** As used in this chapter, unless the context clearly requires otherwise, the following definitions apply:

(1) "Annual payroll" means the total amount of wages paid by an employer, regardless of the time of payment, for employment during a calendar year.

(2) "Base period" means the first 4 of the last 5 completed calendar quarters immediately preceding the first day of an individual's benefit year. However, in the case of a combined-wage claim pursuant to the arrangement approved by the secretary of labor of the United States, the base period is the period applicable under the unemployment law of the paying state. For an individual who fails to meet the qualifications of 39-51-2105 or a similar statute of another state because of a temporary total disability, as defined in 39-71-116, or a similar statute of another state or the United States, the base period means the first 4 quarters of the last 5 completed calendar quarters preceding the disability if a claim for unemployment benefits is filed within 24 months of the date on which the individual's disability was incurred.

(3) "Benefit year", with respect to any individual, means the 52-consecutive-week period beginning with the first day of the calendar week in which the individual files a valid claim for benefits, except that the benefit year is 53 weeks if filing a new valid claim would result in overlapping any quarter of the base year of a previously filed new claim. A subsequent benefit year may not be established until the expiration of the current benefit year. However, in the case of a combined-wage claim pursuant to the arrangement approved by the secretary of labor of the United States, the base period is the period applicable under the unemployment law of the paying state.

(4) "Benefits" means the money payments payable to an individual, as provided in this chapter, with

1 respect to the individual's unemployment.

2 (5) "Board" means the board of labor appeals provided for in ~~Title 2, chapter 15, part 17~~ 2-15-1704.

3 (6) "Calendar quarter" means the period of 3 consecutive calendar months ending on March 31, June  
4 30, September 30, or December 31.

5 (7) (a) "Contributions" means the money payments to the state unemployment insurance fund required  
6 by this chapter ~~but~~.

7 (b) The term does not include assessments under 39-51-404.

8 (8) "Department" means the department of labor and industry provided for in ~~Title 2, chapter 15, part 17~~  
9 2-15-1701.

10 (9) (a) "Domestic or household service" means employment of persons other than members of the  
11 household for the purpose of tending to the aid and comfort of the employer or members of the employer's family,  
12 including but not limited to housecleaning and yard work.

13 (b) The term does not include employment beyond the scope of normal household or domestic duties,  
14 such as home health care or domiciliary care.

15 (10) "Employing unit" means any individual or organization, including the state government and any of  
16 its political subdivisions or instrumentalities or an Indian tribe or tribal unit, partnership, association, trust, estate,  
17 joint-stock company, insurance company, limited liability company or limited liability partnership that has filed with  
18 the secretary of state, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee  
19 or the trustee's successor, or legal representative of a deceased person in whose employ one or more individuals  
20 perform or performed services within this state, except as provided under 39-51-204(1)(a) and (1)(q). All  
21 individuals performing services within this state for any employing unit that maintains two or more separate  
22 establishments within this state are considered to be employed by a single employing unit for all the purposes  
23 of this chapter. Each individual employed to perform or assist in performing the work of any agent or employee  
24 of an employing unit is considered to be employed by the employing unit for the purposes of this chapter, whether  
25 the individual was hired or paid directly by the employing unit or by the agent or employee, provided that the  
26 employing unit has actual or constructive knowledge of the work.

27 (11) "Employment office" means a free public employment office or branch of an office operated by this  
28 state or maintained as a part of a state-controlled system of public employment offices or other free public  
29 employment offices operated and maintained by the United States government or its instrumentalities as the  
30 department may approve.

(12) "Fund" means the unemployment insurance fund established by this chapter to which all contributions and payments in lieu of contributions must be paid and from which all benefits provided under this chapter must be paid.

(13) "Gross misconduct" means a criminal act, other than a violation of a motor vehicle traffic law, for which an individual has been convicted in a criminal court or has admitted or conduct that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of a fellow employee or the employer.

(14) "Hospital" means an institution that has been licensed, certified, or approved by the state as a hospital.

(15) "Independent contractor" means an individual working under an independent contractor exemption certificate provided for in 39-71-417.

(16) "Indian tribe" means an Indian tribe as defined in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b(e).

(17) (a) "Institution of higher education", for the purposes of this part, means an educational institution that:

(i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of a certificate;

(ii) is legally authorized in this state to provide a program of education beyond high school;

(iii) provides an educational program for which the institution awards a bachelor's or higher degree or provides a program that is acceptable for full credit toward a bachelor's or higher degree, a program of postgraduate or postdoctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(iv) is a public or other nonprofit institution.

(b) All universities in this state are institutions of higher education for purposes of this part.

(18) "Licensed and practicing health care provider" means a health care provider who is primarily responsible for the treatment of a person seeking unemployment insurance benefits and who is:

(a) licensed to practice in this state as:

(i) a physician under Title 37, chapter 3;

(ii) a dentist under Title 37, chapter 4;

(iii) an advanced practice registered nurse under Title 37, chapter 8, and recognized as a nurse practitioner or certified nurse specialist by the board of nursing, established in 2-15-1734;

1 (iv) a physical therapist under Title 37, chapter 11;

2 (v) a chiropractor under Title 37, chapter 12;

3 (vi) a clinical psychologist under Title 37, chapter 17; or

4 (vii) a physician assistant under Title 37, chapter 20; or

5 (b) with respect to a person seeking unemployment insurance benefits who resides outside of this state,  
6 a health care provider licensed or certified as a member of one of the professions listed in subsection (18)(a) in  
7 the jurisdiction where the person seeking the benefit lives.

8 (19) "No-additional-cost service" has the meaning provided in section 132 of the Internal Revenue Code,  
9 26 U.S.C. 132.

10 (20) "State" includes, in addition to the states of the United States of America, the District of Columbia,  
11 Puerto Rico, the Virgin Islands, and Canada.

12 (21) (a) "Taxes" means contributions and assessments required under this chapter ~~but~~.

13 (b) The term does not include penalties or interest for past-due or unpaid contributions or assessments.

14 (22) "Tribal unit" means an Indian tribe and any tribal subdivision or subsidiary or any business enterprise  
15 that is wholly owned by that tribe.

16 (23) "Unemployment insurance administration fund" means the unemployment insurance administration  
17 fund established by this chapter from which administrative expenses under this chapter must be paid.

18 (24) (a) "Wages", unless specifically exempted under subsection (24)(b), means all remuneration payable  
19 for personal services, including the cash value of all remuneration paid in any medium other than cash. The  
20 reasonable cash value of remuneration payable in any medium other than cash must be estimated and  
21 determined pursuant to rules prescribed by the department. The term includes but is not limited to:

22 (i) commissions, bonuses, and remuneration paid for overtime work, holidays, vacations, and sickness  
23 periods; and

24 (ii) severance or continuation pay, backpay, and any similar pay made for or in regard to previous service  
25 by the employee for the employer, other than retirement or pension benefits from a qualified plan; and

26 (iii) tips or other gratuities received by ~~the~~ an employee up to an amount equal to the minimum wage, as  
27 established in 39-3-409, for each hour worked, to the extent that the tips or gratuities are documented by the  
28 employee to the employer for tax purposes.

29 (b) The term does not include:

30 (i) the amount of any payment made by the employer for employees, if the payment was made for:

(A) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code;

(B) sickness or accident disability under a workers' compensation policy;

(C) medical or hospitalization expenses in connection with sickness or accident disability, including health insurance for the employee or the employee's immediate family; or

(D) death, including life insurance for the employee or the employee's immediate family;

(ii) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, or other expenses, as set forth in department rules;

(iii) a no-additional-cost service; ~~or~~

(iv) wage subsidies received pursuant to the alternative trade adjustment assistance for older workers program, 19 U.S.C. 2318; or

(v) tips or other gratuities in excess of the tips or gratuities equal to the minimum wage as reported under subsection (24)(a)(iii).

(25) "Week" means a period of 7 consecutive calendar days ending at midnight on Saturday.

(26) "Weekly benefit amount" means the amount of benefits that an individual would be entitled to receive for 1 week of total unemployment."

**Section 2.** Section 39-71-123, MCA, is amended to read:

**"39-71-123. Wages defined.** (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:

(a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and periods of sickness;

(b) backpay or any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan;

(c) tips or other gratuities received by ~~the an~~ an employee up to an amount equal to the minimum wage, as established in 39-3-409, for each hour worked, to the extent that tips or gratuities are documented by the employee to the employer for tax purposes;

(d) income or payment in the form of a draw, wage, net profit, or substitute for money received or taken by a sole proprietor or partner, regardless of whether the sole proprietor or partner has performed work or

1 provided services for that remuneration;

2 (e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based  
3 on its actual value; and

4 (f) payments made to an employee on any basis other than time worked, including but not limited to  
5 piecework, an incentive plan, or profit-sharing arrangement.

6 (2) The term "wages" does not include any of the following:

7 (a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, and other  
8 expenses, as set forth in department rules;

9 (b) the amount of the payment made by the employer for employees, if the payment was made for:

10 (i) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal  
11 Revenue Code;

12 (ii) sickness or accident disability under a workers' compensation policy;

13 (iii) medical or hospitalization expenses in connection with sickness or accident disability, including health  
14 insurance for the employee or the employee's immediate family;

15 (iv) death, including life insurance for the employee or the employee's immediate family;

16 (c) vacation or sick leave benefits accrued but not paid;

17 (d) special rewards for individual invention or discovery;

18 (e) tips or other gratuities in excess of the tips or gratuities equal to the minimum wage as reported under  
19 subsection (1)(c); or

20 ~~(e)(f)~~ monetary and other benefits paid to a person as part of public assistance, as defined in 53-4-201.

21 (3) (a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual  
22 earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the  
23 term of employment for the same employer is less than four pay periods, the employee's wages are the hourly  
24 rate times the number of hours in a week for which the employee was hired to work.

25 (b) For good cause shown, if the use of the last four pay periods does not accurately reflect the  
26 claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for  
27 an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period,  
28 including periods of idleness or seasonal fluctuations.

29 (4) (a) For the purpose of calculating compensation benefits for an employee working concurrent  
30 employments, the average actual wages must be calculated as provided in subsection (3). As used in this

1 subsection, "concurrent employment" means employment in which the employee was actually employed at the  
2 time of the injury and would have continued to be employed without a break in the term of employment if not for  
3 the injury.

4 (b) Except as provided in 39-71-118(7)(c), the compensation benefits for a covered volunteer must be  
5 based on the average actual wages in the volunteer's regular employment, except self-employment as a sole  
6 proprietor or partner who elected not to be covered, from which the volunteer is disabled by the injury incurred.

7 (c) The compensation benefits for an employee working at two or more concurrent remunerated  
8 employments must be based on the aggregate of average actual wages of all employments, except for the wages  
9 earned by individuals while engaged in the employments outlined in 39-71-401(3)(a) who elected not to be  
10 covered, from which the employee is disabled by the injury incurred."

11  
12 NEW SECTION. **Section 3. Effective date.** [This act] is effective January 1, 2010.

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